PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

van Oosterhout et al.

Serial No.: 09/668,555

Appeal No.: 2005-2742

Filed: September 22, 2000

For: METHODS AND MEANS FOR THE TREATMENT OF IMMUNE RELATED DISEASES

Examiner: R. B. Schwadron

Group Art Unit: 1644

Attorney Docket No.: 2183-4541US

NOTICE OF EXPRESS MAILING

Express Mail Mailing Label Number: EV827471155US

Date of Deposit with USPS: June 22, 2006

Person making Deposit: Wendy Neff

REQUEST FOR REHEARING
37 C.F.R. § 41.52

Board of Patent Appeals and Interferences
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Sir:

Pursuant to 37 C.F.R. § 41.52, Appellant respectfully requests a rehearing of the Decision mailed April 28, 2006. Appellant believes the Board misapprehended the disclosure of Scannon and overlooked other portions.

Specifically and as viewed by appellant, the heart of the Board's decision is found on

pages 3-4 of the decision, *i.e.*,

> "Upon consideration of the reference, we find that while Scannon teach (e.g. page 9), alternative immunotoxin compositions, Scannon specifically teach 'in one embodiment of the present invention, an immunosuppressive immunotoxin composition will comprise at least one pan T-cell immunoglobulin reactive agent, reactive with the CD3, CD5 or CD7 antigen clusters.' In our opinion, one of skill in the art reading this teaching in Scannon would immediately envisage a small class of seven compositions with common properties. In re Petering 301 F.2d 676, 681, 133 USPQ 275, 280 (CCPA 1962). Specifically, compositions that will comprise a molecule reactive with: (1) CD3; (2) CD5; (3) CD7; (4) CD3 and CD5; (5) CD3 and CD7; (6) CD5 and CD7; or (7) CD3, CD5 and CD7. Stated differently, we understand Scannon's use of the phrase 'at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters,' to represent a short-hand way of expressing the seven compositions set forth above. In addition, we note that while the title of the Scannon reference is 'immunosuppression with anti-pan T cell immunotoxin compositions,' the only anti-pan T cell immunoglobulin reactive agents taught by Scannon, are CD3, CD5 and CD7. See Scannon, page 9. Further, as set forth on page 4 of Scannon, 'the cytotoxic agent component of the immunotoxin is preferably a ribosomal inhibiting protein, such as ricin or ricin A-chain.' Accordingly, we agree with the examiner's finding that Scannon teach a pharmaceutical composition containing the immunotoxins anti-CD3-ricin A and anti-CD7-ricin A."

The examiner is not believed to have made these contentions (*e.g.*, a "Petering" analysis).

In response to the *Petering* analysis, appellant admits that Scannon states "Thus, in one embodiment of the present invention, an immunosuppressive immunotoxin composition will comprise at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters."

The Decision, however, appears to overlook the very next sentence, which states:

> "Alternatively, the immunotoxin composition will be composed of two or more immunoglobulins, each reactive with a different marker of the same or different cell populations to ensure a broad spectrum of T-cell neutralization. Typical combinations will include immunoglobulins recognizing CD4 and CD8, TAC and CD4, or CD7, CD11 and CD5."

(Scannon, p. 9, underlining added).

It is the Appellant's view that the first quoted sentence of Scannon is being misapprehended as containing disclosure that does not exist, and the very sentence, which is the one closest to the instant situation, is being overlooked.[1]

Clearly, the embodiment of Scannon that is "alternative" to the immunosuppressive immunotoxin composition comprising the at least one pan T-cell immunoglobulin reactive agent (*i.e.*, "reactive with the CD3, CD5 or CD7 antigen clusters") is the one identified in the very next sentence of Scannon, and is the one that has "two or more immunoglobulins, each reactive with a different marker", not one of which markers are claimed by appellant's claims.

This interpretation is confirmed by Scannon's description where it is stated that the "pan T-cell immunoglobulin reactive agent" is "reactive with the CD3, CD5 or CD7 antigen clusters", not the plural "agents" or the alternative "and" or "and/or", which might then be consistent with what is being "envisaged" in the Decision. (Scannon, p. 9, underlining added). It is well settled that anticipation cannot be predicated on mere conjecture as would appear to be what is being done in the instant case. *W.L. Gore & Assocs. v. Garlock, Inc.*, 721 F.2d 1540, 1554, 220 USPQ 303, 314 (Fed. Cir. 1983) *cert. denied*, 469 U.S. 851 (1984). Likewise, the identical invention must be shown in as complete detail as is contained in the claim. *Richardson v. Suzuki Motor Co.*, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

Scannon describes CD3, CD5 and CD7 as the preferred pan-T-cell antigens when using one immunotoxin. (*See, e.g.*, Scannon claim 7). The antigens mentioned after that (*i.e.*, CD4

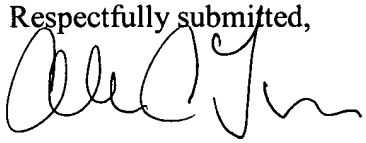
[1] It is well established that one may not pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art. *See Bausch & Lomb, Inc., v. Barnes-Hind/Hydrocurve Inc.*, 796 F.2d 443, 448, 230 USPQ 416, 419 (Fed. Cir. 1986), cert. denied, 484 U.S. 823 (1987) and *In re Kamm*, 452 F.2d 1052, 1057, 172 USPQ 298, 301-02 (CCPA 1972).

and CD8; TAC and CD4; or CD7, CD11 and CD5) are examples of three fixed combinations when more than one immunotoxin simultaneously (as they are textually separated by ";"). These examples do not include the claimed CD3 and CD7 combination.

Scannon reduces to practice only a single embodiment: the creation and testing of an immunotoxin targeting the CD5 molecule. This contrasts with the 11 different target molecules that are identified in the Specification, a mere two of which, CD3 and CD7, are cited by the examiner as anticipating the present claims. As such, it would be unusual for the single embodiment of CD5 disclosed in Scannon to provide an adequate basis to support the generic use of 10 other target molecules or the extensive number of possible combinations thereof. The other cited reference, Thorpe, does not overcome this insufficiency, and thus the claims are also not made obvious by the combination.

In view of the foregoing, appellant respectfully requests rehearing and reconsideration.

Respectfully submitted,



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Date: June 21, 2006